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No. 386

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1963

FEDERAL POWER COMMISSION, Petitioner

v.

TEXACO INC. and PAN AMERICAN PETROLEUM
CORPORATION, Respondents

On Writ of Certiorari to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR REHEARING BY RESPONDENT
PAN AMERICAN PETROLEUM CORPORATION

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**PETITION FOR REHEARING BY RESPONDENT
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Pan American Petroleum Corporation (Pan American), a respondent in the above-entitled case, prays that this Court grant rehearing of its decision entered in this case on April 20, 1964, and also respectfully prays for

- (1) clarification of the Court's decision with respect to possible procedures upon ultimate remand to the Federal Power Commission; and

(2) clarification as to remand to the Court of Appeals for the Tenth Circuit for further proceedings upon issues *not* yet considered by that court and therefore *not* before this Court or decided in this case.

REASONS FOR GRANTING REHEARING

1. This Court's decision of April 20, 1964, has left uncertainty as to the exact nature of proceedings before the Federal Power Commission (Commission) now permissible upon ultimate remand to that agency. With reference to the Commission's "general" rules at issue, this Court stated (p. 8, slip opinion):

"The present regulations do not pass on the merits of any rate structure nor on the merits of a certificate of public convenience and necessity; they merely prescribe qualifications for applicants."

This Court also stated with reference to the same "general" rules (p. 11, slip opinion):

"Whether Pan American can qualify for a certificate of public convenience and necessity has never been reached. It has only been held that its application is not in proper form because of the pricing provisions in the contracts it tenders. No decisions on the merits have been reached."

In view of the limited holding below¹ and of the narrow question presented here by the Commission in its petition for writ of certiorari, the language quoted above appears to limit this Court's decision to the following:

(1) The Commission is empowered to "proscribe" contract pricing provisions by "rule" in advance of

¹ *Teraco Inc., et al. v. Federal Power Commission*, 317 F. 2d 796 (10th Cir. 1963).

tender of specific applications under Section 7 of the Natural Gas Act; and

(2) The Commission may so "proscribe" such provisions through general rule-making procedures spelled out in Section 4(b) of the Administrative Procedure Act, and need not follow the procedures specified in Sections 5, 7, and 8 of that statute.

However, Pan American understands this Court's decision also to mean that as to the "merits" of the specific price renegotiation clause in the contract here involved, the door remains open for a Commission decision "on the merits" of such a clause in the first instance either (1) in a proceeding on an application under Section 7(c) of the Natural Gas Act, or (2), through action upon a petition for "waiver" of the general rules involved in the instant case. Whether this is a correct understanding of this Court's statement that "[n]o decisions on the merits have been reached" is of critical importance because such renegotiation clauses have never been the subject of any formal proceedings before the Commission (R. 15-17), are widely used in the industry, and could satisfy Commission requirements in administration of the Act under the "area-rate" approach now being developed by the Commission. Rehearing thus will permit clarification as to permissible future action upon renegotiation clauses in conformity with this Court's opinion.

2. Of more immediate importance, rehearing here is required to eliminate any possible question, upon remand, as to issues *not* yet decided by the Tenth Circuit or by this Court. The Tenth Circuit limited its conclusions to the issues of (1) Commission power to "proscribe" clauses in advance by general rule, and (2) whether an "adversary" hearing must precede

such Commission action formulating a rule (R. 119, 121). That court did *not* reach and did *not* decide other questions before it, including the questions of whether the "rules" involved meet the test of "reasonableness," and of whether the rules are arbitrary and an abuse of discretion in specific application to renegotiation clauses (see R. 119, 74, 80). These issues relating to "reasonableness" of the rules in their application thus were *not* before this Court in the instant case (see "Brief for the Federal Power Commission" before this Court, pp. 2, 15, 49),² and were *not* briefed by the parties before this Court. The decision of this Court on April 20, 1964, therefore clearly should *not* bar Tenth Circuit consideration of these undecided issues upon remand.³ However, to clarify posture of the case upon remand, Pan American respectfully requests rehearing and formulation of remand directives making clear that these still undecided issues now may be heard fully by the Tenth Circuit, and that that court may thus accord to Pan American the complete, full review upon all issues in the case contemplated by Section 19(b) of the Natural Gas Act. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Union Trust Co. v. Eastern*

²See also "Memorandum for the Federal Power Commission" in No. 684, This Term, *The Superior Oil Company v. Federal Power Commission*, pp. 2, 6, where the Commission called attention to the fact that the issue of "reasonableness" of the rules, "as applied," was "not reached" by the Tenth Circuit and was *not* before the Court in the instant case.

³Beyond the decided issues of "power" and "hearing" requirements, under the decisions of this Court involving validity of administrative rules, the issue of "reasonableness" is an additional, separate test of validity. See *American Trucking Associations, Inc. v. United States*, 344 U.S. 298, 314 (1953); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956).

Air Lines, 350 U.S. 962 (1956); *Slochower v. Board of Higher Education*, 351 U.S. 944 (1956). Since this Court has held *Storer* to be controlling here, Pan American should be accorded at least the same opportunity for further hearing below which this Court directed in its remand in *Storer*. The "remand" directive there was clearly stated:

"We reverse the judgment of the Court of Appeals and remand the case to that court so that it may consider respondent's other objections." (351 U.S. at 206).

Elemental justice requires such clarity in the directive in the instant case.

3. In connection with the undecided issue of "reasonableness" of the rules in application to renegotiation clauses of the type in the instant case, Pan American respectfully calls attention to the fact that the decision in *Superior Oil Co. v. Federal Power Commission*, 322 F. 2d 601 (9th Cir. 1963), *cert. den.*, May 4, 1964 No. 684, This Term), is not and cannot be dispositive. The Ninth Circuit limited its own decision as to these Commission's rules to the contract then before it and the specific types of clauses there involved (322 F. 2d at 610).* While "reasonableness" might have been briefed and decided here *had* the *Superior* petition in No. 684 been granted by this Court, denial of the *Superior* petition on May 4, 1964, also means that upon remand in the instant case, the Tenth Circuit is free to consider the "reasonableness" issue undecided by

* The Ninth Circuit thus stated in reference to the Commission rules in issue: "We are not here concerned with the validity of those regulations insofar as they may affect price-changing clauses of a kind not involved in this proceeding."

this Court. Pan American therefore also respectfully requests clarification upon rehearing to make absolutely certain that upon remand, this Court's order of May 4, 1964, so denying the petition in the *Superior* case, cannot be interpreted as a bar to full consideration of the undecided issues in the Tenth Circuit. In this connection, specific reference is made to the "conclusion" appearing at page 49 of "Brief for the Federal Power Commission" in the instant case wherein the Commission requested reversal and remand "with instructions to conduct further proceedings in *Pan American* . . ." Such remand instructions now would serve to clarify any questions as to the permissible scope of further proceedings in the Tenth Circuit, particularly upon the undecided "reasonableness" issue.

4. With respect to the decision on the merits in the instant case, Pan American respectfully submits that the Court has erred in its construction of Section 4(b) of the Administrative Procedure Act. In view of the fact that the Court's decision as to venue for Respondent Texaco Inc. in the instant case may have resulted in no consideration of that portion of the "Brief for Texaco Inc." treating the merits of the issue as to Section 4(b), Pan American respectfully urges the Court, upon rehearing, to reconsider its construction of the Administrative Procedure Act in light of the extensive briefing as to Section 4(b), and the legislative history thereof, in the brief previously filed by Respondent Texaco Inc. in the instant case.

5. In summary, by this petition, Pan American respectfully urges the Court

(a) upon rehearing to reconsider its construction of the Administrative Procedure Act and decision that

Sections 5, 7, and 8 thereof were not applicable to the "rule-making" proceeding before the Commission;

(b) upon rehearing and in formulating the remand to the Tenth Circuit *in any event*, to clarify its decision as to availability thereunder to Pan American of a hearing or decision by the Commission, in the first instance, upon the "merits" of the renegotiation clause under Section 7(e) of the Natural Gas Act; and

(c) *of most importance*, upon rehearing and in formulating the remand to the Tenth Circuit *in any event*, to make clear as this Court did in the *Storer* case, that the still unheard, undecided issue of "reasonableness" of the Commission's rules as applied to renegotiation clauses of the type here in issue may be briefed, argued, and decided by the Tenth Circuit upon remand of the instant case.

CONCLUSION

For the foregoing reasons, Pan American respectfully prays for rehearing upon the Court's decision of April 20, 1964, in the instant case.

Respectfully submitted,

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May, 1964

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Re-hearing is presented in good faith and not for purposes of delay.

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